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IN THE

Supreme Court of the United States

October Term, 1961

No. 777

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
MORRIS FRIEDBERG,
Relator-Appellant,

—against—

HENRY SILBERGLITT, the Warden of the City Prison,
Borough of Manhattan,
Respondent-Respondent.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Jurisdiction and Statement

The relator-appellant hereby appeals from a judgment of the Court of Appeals of the State of New York made and entered on the 16th day of November, 1961, which order denied the appellant leave to appeal to said Court from an order of the Supreme Court of the State of New York, Appellate Division, First Department, made and entered the 31st day of May, 1961, which unanimously and without opinion affirmed an order of the Supreme Court

of the State of New York, in and for the County of New York, Special Term, Part I, which dismissed a Writ of Habeas Corpus brought on behalf of the relator-appellant and made and entered on the 12th day of June, 1959.

Opinion Below

No opinions were written by the Supreme Court of the State of New York, Appellate Division, First Department and by the Court of Appeals of the State of New York. The opinion of Special Term, Part I, is contained in the record which will be attached hereto as an exhibit and marked "Exhibit A".

Jurisdiction

The relator-appellant has resisted an attempt by the State of Michigan for his extradition. This effort to extradite is structured on the provisions of Section 834 of the Code of Criminal Procedure of the State of New York. In essence the statute permits extradition where the demanding state asserts that its penal law has been violated and that the acts complained of had they occurred in the asylum state would also have been deemed criminal. The appellant, by affidavit, is charged with the crime of Grand Larceny.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

The Novel Question Presented

A serious and novel question respecting the quantity and quality of the proof necessary to successfully extradite an individual pursuant to Section 834 of the Code of Criminal Procedure of the State of New York is in issue. Research would indicate this is a matter of first impression.

The Court below denied the relator due process of law in violation of Amendment XIV of the Constitution of the United States in that it limited its hearing to the questions of whether Morris Friedberg was the individual sought by the State of Michigan and whether the crime had been committed in that State. A broader scope of examination was required pursuant to the conditions contained in Section 834 of the Code of Criminal Procedure. The relator should have been allowed to establish that the alleged crime, charged in the State of Michigan, was not deemed criminal in the State of New York had the acts complained of occurred in New York.

Section 834 of the Code of Criminal Procedure denies to the relator or any one similarly situated procedural due process of law in contravention of Amendment XIV of the United States Constitution. It fails to define and delineate the extent and quality of the evidence required to effect an extradition pursuant to its requirements. In so doing, it becomes vague and substitutes surmise and conjecture for ascertainable standards of procedure and substance.

Statement

In January of 1959, Morris Friedberg met Robert Hanna, an employee of Drummy Oldsmobile Company and the sole

witness. Drummy is a Detroit automobile agency. At that time the relator-appellant purchased a car and paid for it.

It is now charged that approximately two weeks later, the relator called Mr. Hanna from New York City. The entire transaction and the alleged facts relating to it were oral and occurred during this conversation.

It is asserted that Friedberg ordered five Oldsmobiles and Hanna alleged that it was agreed that upon receipt of Friedberg's check for $5,000.00, the vehicles would be shipped. It is also alleged that upon delivery of the cars to Friedberg, the balance then outstanding would be paid.

On January 29, 1959, the relator drew a $5,000.00 check against the account of the Diamond News Service and forwarded it to Drummy. This check was returned after deposit ostensibly bearing the legend "uncollectible funds".

Hanna related that Friedberg, after learning of the fate of the check, immediately left for Detroit and personally delivered his certified draft to Drummy for $4,500.00. This was accepted and no effort was made then and there to enlist the Michigan criminal processes despite the relator's presence and amenability.

In the earlier part of February, 1959, Hanna and his employer arrived in New York City and a conference was had and held at a local police station. There a demand was made for the balance due. No arrest was made.

Approximately two weeks later, the parties convened at the Waldorf-Astoria Hotel. This was followed by the commencement of these proceedings.

The hearing elicited that Drummy, two days prior to its receipt of the check, had sent to the relator-appellant,

on its own volition, five statements of "Motor Vehicle Sale". These documents disclosed that the vehicles were unencumbered and fully paid. Several days subsequent to the return of the checks, the Drummy organization, voluntarily sent to the relator-appellant five "Certificates of Title" relating to the cars.

Mr. Hanna, after stating that the check had been returned because of "uncollectible funds" amended this and admitted that the dishonor was for "*uncollected funds*".

The Question Is Substantial and Novel

It is submitted that the question raised is one of substance and a definitive decision by this Court will tend to clarify an area of the law that is muddled and imprecise. It is unquestioned that the conventional method of extradition needs no further clarification. Prior to the passage of the so-called Uniform Extradition Act, the mere assertion that the extraditee had been in the demanding state and had violated its laws was sufficient to establish a prima facie case of extradition.

Under Section 834 of the Code of Criminal Procedure of the State of New York, upon which this action had been predicated, it is essential that the acts complained of and allegedly perpetrated by the potential extraditee were acts criminal in the demanding state but also were criminal had the same acts occurred in the asylum state.

The statute does not provide or delineate or define the requisite proof necessary to satisfy its interdictions. As a result there is great confusion amongst the several states who have adapted the so-called Uniform Extradition Act.

It is difficult to determine, if not impossible, what the demanding state is required to prove. It is infinitely more difficult to determine what latitude should be given to the extraditee in his resistance to extradition. Complication is further engendered in the instant case by the obvious fact that this extradition is not predicated upon either an Indictment or an Information but rather rests for its viability on a sworn affidavit.

It is submitted that by virtue of the muddled state of the law this appellant is being denied due process of law in violation of Amendment XIV of the Constitution of the United States.

It is submitted that the question presented here is substantial and vital and of great public importance.

Respectfully submitted,

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EXHIBIT A

Opinion by Mr. Justice Spector at Special Term

[New York Law Journal—June 15, 1959]

◆

[Same Title]

◆

Relator asks to have a warrant of extradition vacated. Counsel were heard and evidence on behalf of complainant was taken. It was conceded that the relator is the individual named in the warrant. From such testimony, I find that the acts of the relator, if occurring in the State of New York, would constitute a crime, as such does in the State of Michigan (C. C. P. sec. 834). It is not the function of the court to determine the guilt of the relator, only that the alleged acts would constitute a crime in the State of New York as well as in the state seeking extradition. Accordingly, the writ is dismissed and the prisoner is remanded.

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MOTION TO DISMISS OR AFFIRM

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MAY IT PLEASE THE COURT:

NOW COMES THE APPELLEE in the above entitled cause and moves the appeal be dismissed or, in the alternative, that the final judgment appealed from be affirmed.

Statement

This is an appeal from a final order of the New York Court of Appeals, entered November 16, 1961, denying the appellant leave to appeal to the said court from an order

of the Appellate Division of the Supreme Court of New York, entered May 31, 1961, which unanimously affirmed, without opinion, an order of the New York Supreme Court, County of New York, Special Term Part II (SPECTOR, J.), dated June 14, 1959, dismissing, after a hearing, a writ of habeas corpus brought by the petitioner to test the validity of his extradition to the State of Michigan.

The Facts

The State of Michigan sought the extradition of the relator pursuant to Section 834 of the New York Code of Criminal Procedure, alleging, by complaint and supporting affidavits, that the relator had committed acts in the State of New York intentionally resulting in a crime in the State of Michigan, which acts would be punishable under the laws of New York had the consequences been felt in the latter jurisdiction.

Specifically, the complaint, executed by John L. Drummy before a Justice of the Peace for Macomb County, Michigan, alleged, in substance, that the relator, with intent to defraud, made false statements and executed a check for over $100, which was returned for insufficiency of funds. Further, the complaint alleges that the relator obtained shipment of six new Oldsmobile cars valued at approximately $20,000 by means of false pretenses (*ibid.*). In addition, the amended affidavit of Hon. Cecil A. Byers, the prosecuting attorney of the said Macomb County, sets forth in detail the factual allegations upon which his application for the relator's extradition is founded. There, the transactions between the relator and Drummy Oldsmobile are fully narrated.

At the hearing, the testimony of the only witness recounted, a telephone order placed by the relator for certain automobiles on which he agreed to make an initial payment of $5,000. The relator's check for that amount was received and the cars immediately released for transport to New York. At the time the $5,000 check in question was drawn, the relator had $45.58 on deposit in his bank.

Pertinent New York Statutes Involved

Code of Criminal Procedure

Section 834. Extradition of persons not present in demanding state at time of commission of crime.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section eight hundred and thirty with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this title, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; * * *

Penal Law

Section 1292-a. Issuing fraudulent check, draft or order; how punished.

Any person who, within intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money either in his own behalf or in behalf of any other person, or as an agent or representative of another or as an officer or agent of a corporation or purporting to be such agent, representative or officer, upon any bank or other depositary, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the payment of such check, although no express representation is made in reference thereto, shall be guilty of a misdemeanor; and if money or property is obtained from another thereby is guilty of larceny and punishable accordingly. In any prosecution under this section as against the maker or drawer the proof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depositary. * * *

Section 1293-b. Obtaining property or credit by use of false statement.

Any person:

Who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is

interested, or for whom he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, the execution, making or delivery by any person, firm or corporation of any bond or undertaking, or the making, acceptance, discount, sale or indorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation;

* * *

Shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both fine and imprisonment.

I

There is no substantial question presented.

Since the proof clearly showed the commission of a crime both under the laws of the demanding and rendering states, the discretionary power of rendition was properly exercised by the Governor of the State of New York pursuant to Section 834 of the New York Code of Criminal Procedure.

The relator attempts to construct a Federal question by claiming that the issue at the hearing held on his writ of habeas corpus to test the validity of the extradition was unduly limited, resulting in a denial of due process of law under the Fourteenth Amendment to the United States Constitution. Utterly barren of support, the relator's argument challenges as well the constitutionality of the

pertinent section of the Uniform Extradition Act. As incorporated in Section 834 of the New York Code of Criminal Procedure, the relator considers the provision defective for failing to "delineate or define the requisite proof necessary to satisfy its interdictions."

With respect to his first contention, stated in a single naked sentence (brief, p. 3), it is clear that the proof adequately established that the acts charged would be deemed criminal under the laws of New York. At the very least, the fraudulent making and uttering of check with knowledge of the gross insufficiency of the funds on deposit constitutes the New York misdemeanor of violation of Section 1292-a of the Penal Law (*supra*, p. 4). Since the automobiles were obtained thereby, the same Section makes the act punishable as larceny. Needless to add, the relator offered no evidence to overcome the presumption of his knowledge of the insufficiency of funds and concomitant intent to defraud created by the statute itself. In urging this point, the relator abandons his argument below wherein he tacitly conceded that his acts would be criminal in New York under Sections 1292-a and 1293-b of the New York Penal Law and concentrated his attack on an alleged lack of proof of the elements of criminality under the law of the demanding state, Michigan. This latter contention is not raised in the instant appeal.

Concerning the relator's second contention, a reading of the statute itself reveals its admirable clarity and specificity. There can be no doubt whatever of the requisite elements for the issuance of a valid warrant of rendition, in the exercise of gubernatorial discretion, where a wrongdoer commits an act in one state resulting in a crime in another.

This provision, adopted to supplement the Constitutional mandate for the return of fleeing fugitives, requires a showing of two simple elements. First, the act of the wrongdoer must "intentionally result" in a crime in the demanding jurisdiction. Second, the conduct, if it had been consummated in the asylum state, must be "punishable under its laws."

Notably clear, the elements were fully complied with in the instant case.

Conclusion

For the foregoing reasons, the appeal should be dismissed, or in the alternative, the order of the court below dismissing the relator's writ of habeas corpus and rendering him to the authorities of the demanding state, should be affirmed.

Respectfully submitted,

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